

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

FILED

JUL 29 2003

SAMUEL L. KAY, CLERK
U.S. District & Bankruptcy Courts
Southern District of West Virginia

KAREN A. GRENNELL *cgt*
NINA J. BOWLES, et al.,

Plaintiffs,

vs.

WESTERN-SOUTHERN LIFE
INSURANCE COMPANY, et al.,

Defendants.

Civil Action No. 3:03-0833

THROUGH
3:03-2019

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446, Defendants The Western and Southern Life Insurance Company (incorrectly referred to in the Complaint as Western-Southern Life Insurance Company and hereinafter referred to as "Western-Southern"), John Thabet, George Crump, Roger Shinn, Terry Shirley, Howard Parker, James Elias, and Thomas Russell (the "Individual Defendants") (collectively, "Defendants") hereby remove the actions listed on Exhibit A hereto from the Circuit Court of Mason County, West Virginia, to the United States District Court for the Southern District of West Virginia.

1. Each of the actions listed on Exhibit 1 was filed in the Circuit Court of Mason County, West Virginia, on June 3, 2003. Each plaintiff listed on Exhibit 1 adopted the allegations of the same Complaint, a copy of which is attached hereto as Exhibit 2. Certified copies of the docket sheet, several affidavits, and the Summons are attached as Exhibit 3. Therefore, the filing requirements of 28 U.S.C. § 1446(a) have been satisfied.

2. This Notice is timely given. Defendant Western-Southern was served with the Summons and Complaint in a Civil Action, No. 03-C-100, on June 30, 2003. See Exhibit 3.

Upon information and belief, some, but not all, of the Individual Defendants have been formally served with the Complaint and/or a Summons in one such action as well. Where such service was effected on an Individual Defendant, it occurred after June 30, 2003. By giving this Notice at this time, Defendants do not concede that service of process has been properly or sufficiently effected in the actions listed on Exhibit 1, and they reserve all rights to contest the improper service.

3. Mason County, West Virginia, is located within this District and Division.

4. This Court has original jurisdiction of these actions under 28 U.S.C. § 1332, and removal jurisdiction under 28 U.S.C. § 1441, because:

- a) The amount in controversy in each case exceeds \$75,000.00, exclusive of interest and costs.
- b) The proper parties have completely diverse citizenship, and none of the proper defendants is a resident of West Virginia.
- c) Defendant Western-Southern is an Ohio corporation with its principal place of business in Cincinnati, Ohio. See Complaint, ¶ 2.
- d) None of the Plaintiffs listed on Exhibit 1 is a citizen of Ohio or West Virginia.

5. Plaintiffs have attempted to defeat the diversity and removal jurisdiction of this Court over the actions listed on Exhibit 1 by fraudulently and improperly joining the Individual Defendants, each of whom is a citizen of the State of West Virginia (with the exception of Roger Shinn, who is a citizen of the State of Ohio). See Complaint, ¶ 2. Because of their fraudulent joinder, the citizenship of the Individual Defendants can and should be disregarded. No cause of action can be established against the Individual Defendants because:

- a) On information and belief, none of the Individual Defendants acted as agent for Western-Southern in any transaction or dealings with any Plaintiff listed on Exhibit 1.
- b) The Individual Defendants were licensed to sell insurance for Western-Southern only in West Virginia and, in some cases, Ohio, where none of the plaintiffs listed on Exhibit 1 reside.
- c) Insurance agents, such as the Individual Defendants here, acting within the scope of their employment for an insurer may not be sued in their individual capacity in tort or in contract.
- d) No Plaintiff listed on Exhibit 1 has pled or can plead a claim of fraud against an Individual Defendant with the specificity required by W.Va. R. Civ. P. 9(b) and Fed. R. Civ. P. 9(b).
- e) Plaintiffs' claims for "Negligent and Wanton Training and Supervision" (§ 21) are actionable solely against an employer and not against the Individual Defendants.
- f) Breach of the duty of good faith and fair dealing implied in an insurance contract is actionable only against a party to that contract, *i.e.* the insurer or insured. It is not actionable against the Individual Defendants.
- g) Plaintiffs' claims are barred by the applicable statutes of limitations.
- h) The plaintiffs in some of the cases on Exhibit 1 have previously released the Individual Defendants in connection with the settlement of the nationwide class action approved by the Court in Kreidler v. Western-Southern Life Assurance Co., Case No.95-CV-157 (Erie County, Ohio Court of Common Pleas).

6. Because no properly-joined defendant is a citizen of the State of West Virginia, and each of the plaintiffs listed on Exhibit 1 is diverse from Western-Southern, the only properly-joined defendant, there is complete diversity of citizenship in these actions.

7. All Defendants consent to removal and join in this notice.

8. A Notice of Filing of this Notice of Removal, with a copy of this Notice attached, will be promptly filed in the Circuit Court for Mason County, West Virginia, and served on counsel of record for the Plaintiffs.

WHEREFORE, Defendants remove the actions listed on Exhibit A from the Circuit Court of Mason County, West Virginia, to the United States District Court for the Southern District of West Virginia, Huntington Division.

DATED: July 29, 2003.

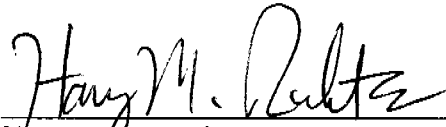


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